IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1145 of 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	
5	Whether it is to be circulated to the civil judge ?	

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MEMON HAJI HARUNBHAI HAJI ALIBHAI - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
M/S THAKKAR ASSOC. for Appellant(s) : 1,
MS DS PANDIT, LD.APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 25/01/2007

ORAL JUDGMENT

1. The present appeal is preferred by the appellant-orig.convict under Section 374 of the Code of Criminal Procedure, 1973, challenging the judgment and order of conviction and sentence dated 19th October, 1995, passed by the learned Additional

Sessions Judge, Sabarkantha at Himatnagar, in Sessions Case No.88 of 1994, whereby the learned trial Court has held the appellant guilty for the offence punishable under Section 5 of the Explosive Substances Act, 1908 (hereinafter referred to as 'the Act'); and by the very judgment and order, the learned trial Court has acquitted the appellant from the charge of offence punishable under Section 4(b) of the Act. Ms.D.S. Pandit, learned Additional Public Prosecutor, appearing for the respondent-State, fairly submits that the State has not preferred any acquittal appeal against the said judgment and order of acquittal of the appellant qua the offence punishable under Section 4(b) of the Act. So the judgment and order of conviction and sentence passed against the appellant is before this Court by way of present appeal. While admitting the appeal, this Court has enlarged the appellant on bail and at present also, the appellant is on bail since 26th March, 1996.

2. Shri Haresh Joshi, learned counsel appearing on behalf of M/s.Thakkar Associates for the appellant, has taken me through the judgment and order under challenge as well as the evidence led during the course of trial. He has also pointed out relevant documents considered by the learned trial Court while linking the appellant with the offence punishable under Section 5 of the Act. The said judgment and order is challenged on the various grounds mentioned in paragraph no.3 of the memo of the appeal. According to Shri Joshi, various arguments were also advanced before the learned trial Court and the same are reflected in paragraph no.10 of the judgment and order under challenge. In response to the query raised by the Court, Shri Joshi has fairly submitted that he has no grievance with the scientific finding recorded qua the alleged material found from the hotel owned by the appellant. Though the premises from where the objectionable substances were

recovered, is referred to as a hotel, in reality, the premises is a small restaurant on one of the main roads of town Idar which is a Taluka Headquarter of District Sabarkantha, and the said hotel/restaurant is in the vicinity of a crowded market area nearby bus-stand. The appellant was running this restaurant at the relevant point of time for the last about 20 years. During the course of recovery, three explosives substances popularly known as 'Tota' along with seven caps and pieces of wires were recovered. The learned trial Court has appreciated the panchnama drawn by the recovery officer and also the slips signed by the panchas which were affixed on the muddamal. While dealing with the case placed by the prosecution, the learned trial Court has ignored the very relevant aspect that the appellant may be an innocent person and not aware about the articles lying in his restaurant found during the search.

3. While assailing the judgment and order under challenge on various grounds, Shri Joshi has initially concentrated his arguments mainly on two grounds and his first submission is, for the sake of argument, if it is accepted that some responsible officer had received the secret information and on the strength of such a secret information after midnight, the restaurant of the appellant was got opened and the same was searched; and prohibited substance was recovered in presence of panchas, even then whether it would have been safe for the Court to jump to a conclusion on the strength of the evidence available on record that the appellant was conscious about presence of those articles which were found during the search. The place from where the articles were found cannot be said to be a hidden place. If the appellant was really guilty, he could have hidden these articles and sealed the same in a very secret manner and also could not have trusted the muddamal as it was found from the area near the

refrigerator, which was being used daily by all the persons including servants working in the restaurant. One plastic container which is normally being used to carry liquid was lying and it is the say of the prosecution that these prohibited articles were wrapped in a newspaper. Nobody would keep such articles which can be said to be visible to each visitor of restaurant, if the accused had any intention to hide and use them with ulterior motive, and the area from where these articles were lying was also found wet.

4. It is true that in such or similar cases, the prosecution is not supposed to establish the ultimate mens rea as submitted by Ms.D.S. Pandit, learned Additional Public Prosecutor, but to link the appellant with the crime, the prosecution is supposed to establish that the appellant is the person responsible in putting these articles from where they were found or he had conscious knowledge about availability of these articles at the place from where they

were recovered. There is no description about the newspaper in which the said articles were wrapped. If the date of the newspaper is readable, it could have provided some clue in favour of the prosecution. When it is in evidence that these articles can be used in deepening the well in an agricultural field, the presence of such articles in a restaurant, that too, in a restaurant of a small town like Idar, ought not have been viewed in a different manner. Of course, it is not the say of the appellant that he was authorised to hold or possess these articles, but it would not be safe for this Court to accept the reasons assigned by the learned trial Court that as the appellant was the owner and occupier of the said restaurant and the licence for the same is also in his name, it could be presumed or inferred that he had knowledge about all the things lying in the entire premises i.e. restaurant. When it is not necessary for the appellant to place a specific plea of defence, especially when he

is not aware as to how and when these articles have reached to the place from where they have been recovered, he may not have taken risk to put up a specific plea because the burden is on the shoulder of the prosecution to prove that the articles have been recovered from the conscious possession of the appellant, which are contraband or prohibited substances under the Act. There is no convincing evidence to show that the appellant had conscious possession of these articles.

5. I have gone through the entire judgment and order under challenge closely and the evidence read over before me during the course of hearing and there is enough force in the say of Shri Joshi, learned counsel appearing for the appellant, that there is convincing evidence to show that the appellant had conscious knowledge of these articles. It is very likely that some person adversely interested to defame the appellant may after planting these articles have informed the

Police so that the appellant can be implicated in the serious crime. The other probability which is also simultaneously emerging is that somebody with a view to take these articles at any convenient time during the course of day by putting the same at a particular place, by pointing out these articles to any of the servants of the appellant and that very gentleman may have missed to collect these articles placed by him.

6. The third probability which the Court shall place to consider was that the owner of a restaurant or a hotelier is the custodian of each article which is being brought by its customers or visitors; and the appellant is supposed to preserve articles left by its customers in the manner in which they are, till the owner of such articles comes and claims the same without opening the same because he becomes the trustee of each such articles when a customer forgets any article in the hotel or restaurant. The question would

be how the appellant came to know that such an eventuality has occurred and such serious articles are there in the restaurant, is a crucial question which was required to be considered and the learned trial Court has evaluated the evidence practically from all the angles. Considering the nature of information which was given to the Police Officer and the type of articles which are found, if are compared, it is possible to infer that there was nothing which can be said to be serious in nature. But the information provided to the Police was very grave and, therefore only, the owner of the restaurant i.e. the appellant, was called after midnight and he was compelled to open the restaurant premises. It was not impossible for the Police Officer to put a watch or surveillance on the hotel/restaurant and the correctness of the secret information could be ascertained in the early hours of the next day when the hotel/ restaurant is opened by the appellant-owner. There is enough force in the argument of Shri

Joshi that the learned trial Court has not correctly considered the other probabilities emerging from various circumstances available from the evidence. As if the appellant has committed any serious crime against the Nation, he was arrested, his bail plea was also not accepted in view of the charge of offence punishable under Section 4(b) of the Act and has remained in Jail for about 16 months. Ultimately, when the Court has accepted that the appellant is not responsible for commission of the offence punishable under Section 4(b) of the Act, whether it would be justified for this Court to confirm the finding whereby the appellant has been held guilty of the charge punishable under Section 5 of the Act, is the question posed by Shri Joshi. When the Court was convinced that no offence punishable under Section 4(b) of the Act has been made out and the prosecution has failed in establishing the said charge, learned trial Court ought to have thought as to whether the appellant deserves benefit of

doubt considering the type of articles found during the course of search. One more probability which has come into the mind of the Court is that the bona fide purchaser of these articles from a licensed dealer under certain apprehension may have approached a person near to Police personnel, only for inquiry that he has forgotten some articles purchased by him which are sensitive and if are found some other persons or used by some other persons, he (the anxious person) would be held responsible. He may also try to see that he is able to collect these articles from the said restaurant and the Police with a view to make a show, may have created hue and cry as if some information of commission of very serious crime has been received by them. The length of wires recovered, size and explosion strength of three explosive substances namely 'Tota', the Court was convinced that the same could have been used by an agriculturist while deepening the well. The Sabarkantha District is basically a district engaged in

agricultural activities and Idar is a small Taluka town. The Court can take judicial notice of one fact also geographically that in Idar Takuka there are big black stones in the agricultural lands and for taking out such stones while digging the well, one has to use such articles.

7. Having considered the totality of the evidence available on record, the Court is of the view that this is a fit case, wherein the appellant could have been given benefit of doubt, especially when he is acquitted from the serious charge of offence punishable under Section 4(b) of the Act and there is no direct evidence of convincing nature that the appellant was conscious and aware about the articles recovered during the search.

8. The conduct of the appellant is also found a conduct of an innocent person, otherwise he would have resisted in accompanying the Police when he was asked to come down to the hotel/

restaurant and to open it. It is not the say of the prosecution witnesses that the appellant has not co-operated in laying down the search. No independent person has said that anybody from the prosecution witness had seen the appellant putting these articles at the place from where they were found. The Police ought to have collected the evidence from the persons who were serving in the hotel and the persons having properties in the neighbouring area to satisfy the Court that the possession of these prohibited substances by the appellant was a conscious possession so that he can be linked with the crime beyond reasonable doubt. It appears that the Investigating Agency has not acted in a fair manner. The thorough examination of all the dealers having licence to sell such articles in the area may have provided some clue to the Investigating Agency. The stock register of the authorised dealers in the entire district for such articles also could have been checked and the dealers could have been examined to

establish that the appellant is the only person who had acquired such articles and was possessing the same for ulterior motive. It is settled legal position that when two views are possible, the view which is in favour of the appellant should be accepted.

9. The alternative argument advanced by Shri Joshi is that the punishment imposed by the learned trial Court is very harsh. When the appellant has remained in Jail for 16 months, the learned trial Court at least ought to have observed that considering the type of articles recovered from the restaurant/hotel of the appellant, the period already undergone can be said to be adequate punishment and there is no need to add the element of deterrence, especially when there was no antecedent of the appellant. It is the experience that the Police is having close eyes on the owners running public hotel and restaurants, and when the appellant was doing his business peacefully for the last about 20 years at the

relevant point of time without any criminal antecedents, the Court could have said that the punishment of the period for which he has remained in Jail would be sufficient. So according to Shri Joshi, the judgment and order under challenge is bad on both these counts. The learned trial Court could have acquitted the appellant giving him benefit of doubt or alternatively he could not have been sentenced for rigorous imprisonment for 5 years.

10. The Court is convinced by the first phase of arguments. There is no need to comment on the adequacy of the punishment imposed by the learned trial Court. According to me, in the present case, two views were possible and, therefore, the learned trial Court has erred in not accepting the view in favour of the appellant under which he could have availed the benefit of doubt. The Court is inclined to give benefit of doubt and to acquit the appellant. While giving benefit of doubt to

the appellant, the Court has considered all the aspects and also the aspect that the judgment and order of acquittal of the appellant qua the offence punishable under Section 4(b) of the Act has not been challenged by the respondent-State by preferring acquittal appeal and the articles even as per the say of the experts, were capable of being used in deepening the well or any other agricultural work and thereby itself, they were not grave articles.

11. In view of above observations and discussion, the present appeal is hereby allowed. The judgment and order of conviction and sentence dated 19th October, 1995 passed by the learned Additional Sessions Judge, Himatnagar, in Sessions Case No.88 of 1994 is hereby quashed and set aside. The appellant-convict is hereby ordered to be acquitted from all the charges levelled against him in respect of the offence in question. The bail bond executed by the appellant-convict stands discharged. The amount of fine if any paid, be refunded to the

appellant-convict on proper identification.

(C.K. Buch, J)

Aakar